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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION THREE

In re A.J., a Person Coming Under the  
Juvenile Court Law.

SONOMA COUNTY HUMAN  
SERVICES DEPARTMENT,

Plaintiff and Respondent,

v.

P.J.,

Defendant and Appellant.

A134787

(Sonoma County  
Super. Ct. No. 3706-DEP)

The presumed father of dependent minor A.J. appeals from jurisdictional and dispositional orders, contending that the juvenile court failed to secure compliance with the inquiry and notice requirements of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). Appellant also argues he was afforded insufficient notice to oppose an application by the Sonoma County Human Services Department (the department) to administer psychotropic medication to the minor.

**FACTUAL AND PROCEDURAL BACKGROUND**

On August 10, 2011, the department filed a petition alleging that A.J., then five years old, came within the jurisdiction of the juvenile court under subdivisions (b), (c), and (g) of section 300 of the Welfare and Institutions Code.<sup>1</sup> Appellant is the presumed

<sup>1</sup> All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

father of A.J. The department alleged that A.J.'s mother and stepfather had a history of drug abuse and domestic violence that rendered them unable to provide adequate care and a safe living environment for the minor. The department further alleged that appellant was incarcerated at Folsom State Prison and was unable to provide care and support for A.J.

At the detention hearing, the court asked mother if she had any Native-American Indian heritage. She responded that her great-grandmother was Cherokee but did not know her great-grandmother's name or whether she was a member of a tribe. She told the court she could get that information from her mother. The court directed mother to obtain the information and provide it to the social worker. The court found that ICWA may apply and ordered A.J. detained. The department subsequently placed A.J. with his maternal grandmother.

In the report prepared for the jurisdictional and dispositional hearing, the social worker reported that mother was unable to produce any information with regard to the possibility of Indian ancestry on her maternal side. Nevertheless, the social worker claimed she had submitted mother's maternal family information to the Bureau of Indian Affairs. The social worker reported that the department was awaiting a response.

At a combined jurisdictional and dispositional hearing conducted on September 7, 2011, the court adopted the findings and orders proposed by the department. Appellant was not present at the hearing. The court found the allegations of the juvenile dependency petition true and declared A.J. a dependent of the court. The court found that ICWA did not apply to A.J.

In an addendum report filed in October 2011, the department recommended denial of reunification services to appellant pursuant to section 361.5, subdivision (b)(13), as a result of appellant's substance abuse history as well as his repeated failure to comply with drug or alcohol treatment programs. The social worker wrote that appellant had failed drug or alcohol treatment on four occasions and had suffered a DUI conviction in 2009.

In December 2011, the court vacated all of the jurisdictional and dispositional orders made with respect to appellant, who was not present at the hearing at which they

were made and did not have an opportunity to object. The court directed the parties to prepare briefs on whether there were grounds to deny reunification services to appellant pursuant to section 361.5, subdivision (b). In his brief, appellant described the 2009 DUI conviction as a “brief relapse” that did not justify denial of services under section 361.5, subdivision (b)(13). The department urged the court to deny offering services to appellant, arguing he had resisted drug and alcohol treatment repeatedly, culminating in his arrest for DUI in 2009.

Following a hearing conducted on January 4, 2012, the court adopted the findings and orders proposed by the department. The court concluded ICWA did not apply. The court denied reunification services to appellant pursuant to section 361.5, subdivision (b)(13), finding there was not clear and convincing evidence that it would be in the minor’s best interest to extend services to appellant. The court also denied appellant’s request for visits and phone contact with A.J. but allowed him to submit letters to the department for delivery to the minor. Appellant filed a timely appeal from the court’s orders.

## **DISCUSSION**

### **1. *Compliance with ICWA Notice Requirements***

Appellant contends the department failed to comply with the notice and inquiry requirements of ICWA. Specifically, he claims there is no evidence the department sent ICWA notice to any Cherokee tribes despite mother’s claim she had Cherokee heritage.

The department concedes it failed to comply with ICWA. The concession is well taken.<sup>2</sup> ICWA and the cases applying it require that there be actual notice to a tribe both as to the proceedings and as to the right to intervene. (See *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1422.) The ICWA notice requirements are not satisfied unless there is

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<sup>2</sup> It is undisputed that appellant’s failure to raise the issue below does not bar consideration of the ICWA notice requirement on appeal. (See *In re J.T.* (2007) 154 Cal.App.4th 986, 991.) Likewise, the department does not dispute that a non-Indian such as appellant has standing to raise an ICWA notice violation on appeal. (See *In re Jonathon S.* (2005) 129 Cal.App.4th 334, 339.)

strict adherence to the law. (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 474-475.) “To satisfy the notice provisions of [ICWA] and to provide a proper record for the juvenile court and appellate courts, [a social service agency] should follow a two-step procedure. First, it should identify any possible tribal affiliations and send proper notice to those entities, return receipt requested. [Citation.] Second, [the agency] should provide to the juvenile court a copy of the notice sent and the return receipt, as well as any correspondence received from the Indian entity relevant to the minor’s status.” (*In re Marinna J.* (2001) 90 Cal.App.4th 731, 739-740, fn. 4; see also § 224.2, subd. (c); Cal. Rules of Court, rule 5.482(b).) “The burden is on the [social services agency] to obtain all possible information about the minor’s potential Indian background and provide that information to the relevant tribe or, if the tribe is unknown to the [Bureau of Indian Affairs].” (*In re Louis S.* (2004) 117 Cal.App.4th 622, 630.)

Here, mother reported that she had possible Cherokee heritage through her maternal great-grandmother but was apparently unable to provide any further information to the social worker. The department stated that it sent notice to the Bureau of Indian Affairs but did not claim to send notice to the Cherokee tribes. The only evidence in the record supporting compliance with ICWA notice requirements, aside from the representations contained in the social worker’s report, is found in an augmentation to the record on appeal. That evidence consists of certified mail and return receipts reflecting service on the Bureau of Indian Affairs, the Secretary of the Interior, the Leech Lake Band of Ojibwe-Chippewa, mother, and A.J.’s stepfather, who is also the father of one of A.J.’s half-siblings. The record does not include copies of the notice sent to the various parties. Notably, the certified mail and return receipts that are contained in the augmented record appear to relate to a separate juvenile dependency petition filed on behalf of one of A.J.’s half-siblings, who has Indian heritage through her father, an enrolled member of the Chippewa tribe. Because we do not have a record of what was actually sent to the various recipients of the mailings, it is unclear whether any of the ICWA notices were sent on behalf of A.J. or included a reference to mother’s claim of Cherokee heritage. Thus, the record is insufficient to support a conclusion that any tribe

or entity received notice of mother's claim of Cherokee heritage. At a minimum, there is no indication any Cherokee tribe received ICWA notice.

Although appellant and the department agree that ICWA notice requirements were not satisfied, they do not agree on the proper remedy for the violation. Appellant urges that we conditionally reverse the challenged orders and remand for compliance with ICWA. The department argues that appellant is not entitled to a reversal, even conditionally, and that the sole remedy is to remand for compliance with the notice provisions of ICWA as they relate to mother's alleged Cherokee heritage.

There has been a split of authority on the proper remedy for an ICWA notice violation. (*In re Christian P.* (2012) 208 Cal.App.4th 437, 452.) We agree with more recent cases "concluding that 'a notice violation under ICWA is not jurisdictional in the fundamental sense, but instead is subject to a harmless error analysis. [Citation.]' . . . 'An appellant seeking reversal for lack of proper ICWA notice must show a reasonable probability that he or she would have obtained a more favorable result in the absence of the error.' " (*Ibid.*) Here, because appellant has not suggested he would have obtained a more favorable result in the absence of the ICWA notice violation, he is not entitled to reversal of the challenged orders. The proper remedy, rather than reversal, is a limited remand to allow the department to comply with ICWA, with directions to the trial court to proceed in conformity with the provisions of ICWA if a tribe determines that A.J. is an Indian child. (See *id.* at pp. 452-453.) If A.J. is determined to be an Indian child, an aggrieved party may petition the juvenile court to invalidate any orders that violated ICWA. (*Id.* at p. 453; *In re Brooke C.* (2005) 127 Cal.App.4th 377, 385.)

## **2. *Insufficient Notice of Application to Administer Psychotropic Medication***

Appellant contends his due process rights were violated because the department failed to provide him with reasonable notice of an application to administer psychotropic medication to A.J. The department concedes the juvenile court erred in granting the application before affording appellant an opportunity to respond.

On December 6, 2011, the department filed an application seeking to administer Risperdal to A.J. In the application, the prescribing physician diagnosed A.J. with

depressive disorder, anxiety, and oppositional behavior. The proof of service accompanying the application reflected that the department mailed notice to appellant on December 6. The juvenile court granted the application the following day, on December 7, 2011. By its terms, the order expired 180 days after its issuance, or in June 2012.

The California Rules of Court permit a parent to oppose an application to administer psychotropic medication by filing an opposition within two days of receipt of the notice of the application. (Cal. Rules of Court, rule 5.640(c)(8).) Here, the court granted the application without affording appellant an opportunity to file an opposition within the two-day period following receipt of the notice.

In light of the fact the challenged order expired in June 2012, appellant acknowledges the issue is technically moot but claims it is likely to recur. The department has no objection to a remand order directing the juvenile court to comply with applicable notice requirements before considering any future applications to administer psychotropic medications. Under the circumstances, we agree that such a directive is appropriate.

#### **DISPOSITION**

The jurisdictional and dispositional orders are affirmed and the matter is remanded to the juvenile court to comply with the notice requirements of ICWA. If A.J. is determined to be an Indian child after proper notice is afforded under ICWA, then the juvenile court shall proceed in conformity with ICWA, and an aggrieved party may petition the juvenile court to invalidate any prior orders that violated ICWA. The juvenile court is further directed to ensure that appellant has received proper notice under rule 5.640 of the California Rules of Court before considering any further applications to administer psychotropic medications to A.J.

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McGuiness, P. J.

We concur:

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Pollak, J.

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Jenkins, J.